Filed 5/8/12 P. v. Johnston CA5

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DAVID RAY JOHNSTON,<br><br>Defendant and Appellant. | F060718<br><br>(Kern Super. Ct. No. BF130728A)<br><br>**O P I N I O N** |

**THE COURT***

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Ellise R. Nicholson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Doris A. Calandra, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Poochigian, J., and Franson, J.

A jury convicted appellant, David Ray Johnston, of possession for sale of methamphetamine (Health & Saf. Code, § 11378) and transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)). In a separate proceeding, the court found true a prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) and a prior conviction enhancement (Health & Saf. Code, § 11370.2, subd. (c)).

On appeal, Johnston contends the court erred when it denied his motion to suppress. We affirm.

## FACTS

In the early morning of September 15, 2009, Johnston was a passenger in a car that was pulled over for a traffic violation. During a search of Johnston, police officers found two baggies containing methamphetamine. The officers also searched a backpack belonging to Johnston and found a digital scale and some plastic baggies with the corners cut off.

On February 19, 2010, the district attorney filed an information charging Johnston with possession for sale of methamphetamine (count 1), transportation of methamphetamine (count 2), and a prior prison term enhancement.

On March 4, 2010, Johnston filed a motion to suppress.

On March 26, 2010, the court held a hearing on Johnston's motion during which the parties stipulated that the court could consider the testimony taken at a suppression motion hearing conducted on November 20, 2009.[1] After the parties submitted the matter, the court issued an order later that day denying Johnston's motion.

[1] This case was originally filed under a different case number, dismissed, and refiled on January 25, 2010. On November 20, 2009, the court conducted a hearing on a suppression motion that was filed in the prior case before it was dismissed.

On April 12, 2010, the district attorney filed an amended information that alleged an additional prior prison term enhancement and a prior conviction enhancement. On the same date, the court granted Johnston's motion to bifurcate the enhancements.

On May 20, 2010, a jury trial in this matter began.

On May 25, 2010, the jury found Johnston guilty on the two counts in the information. On that date, the court also granted the prosecutor's motion to strike one prior prison term enhancement and, in a separate proceeding, it found the prior conviction enhancement true.

On July 29, 2010, the court sentenced Johnston to an aggregate term of eight years, the upper term of three years on his possession for sale conviction, a stayed three-year term on his transportation conviction, a one-year prior prison term enhancement, and a three-year prior conviction enhancement.

***The Suppression Motion***

At the November 20, 2009, suppression hearing, Bakersfield Police Officer Thomas Hernandez testified that on September 15, 2009, at approximately 2:45 a.m., he was on patrol with Officer Dennis Park when they stopped a car, in which Johnston was seated in the back, because the car's front side windows were tinted. Officer Park approached the driver and asked for his license and the car's registration while Officer Hernandez approached Hubbard, the front seat passenger. Within 30 seconds after the car was stopped, Hernandez asked Hubbard if he was on parole and Hubbard responded that he was.

Hernandez then had Johnston, Hubbard, and the driver get out of the car and sit on the curb for officer safety reasons because the officers were going to conduct a search of the car pursuant to Hubbard's parole status. Within two to three minutes after the initial stop, Hernandez asked Johnston if he could search him for anything illegal and Johnston replied that he could. Hernandez patsearched Johnston and did not find anything.

Within three minutes after initiating the stop, Hernandez ran a record's check on the car and its three occupants and confirmed that Hubbard was on parole. During a search of the car incident to Hubbard's parole status, Officer Park searched a black backpack that was located just behind and to the left of Hubbard's left arm when Hubbard was seated in the front seat and next to where Johnston had been seated in the backseat. Inside the backpack, Officer Park found a digital scale and some plastic baggies, with the corners cut off.

Hernandez then asked Johnston a second time if he could search him for anything illegal and Johnston replied that he could. During the second search of Johnston, which occurred six to seven minutes after the initial stop, Hernandez found two baggies of methamphetamine between Johnston's left pants pocket and his undergarments that "were attached to a string that was within the waist of his pants."

Hernandez learned that the backpack belonged to Johnston after the backpack and the interior of the car had been searched.

Officer Park testified, in pertinent part, that he believed it was very likely the backpack belonged to Hubbard. He did not find any identification in the backpack but after he searched it, Hubbard and the driver both indicated that it belonged to Johnston.

## DISCUSSION

### *Introduction*

Johnston contends that the parole status of passenger Hubbard did not justify the search of his backpack. Alternatively, he contends that the search of his backpack and the two searches of his person were unlawful because they were the product of a detention that was unduly prolonged. Thus, according to Johnston, the court erred when it denied his motion to suppress. We will reject these contentions.

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied,

where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

***The Search of the Backpack***

> "In California, probationers and parolees may validly consent in advance to warrantless searches in exchange for the opportunity to remain on or obtain release from a state prison. [Citation.] The California Supreme Court has repeatedly said such searches are lawful. [Citation.] And, these searches have repeatedly been evaluated under the rules governing consent searches, albeit with the recognition that there is a strong governmental interest supporting the consent conditions—the need to supervise probationers and parolees and to ensure compliance with the terms of their release. [Citations.] 'A consensual search may not legally exceed the scope of the consent supporting it. [Citation.] Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of circumstances. [Citation.]' [Citation.]" (*People v. Baker* (2008) 164 Cal.App.4th 1152, 1158 (*Baker*).)

> "When executing a parole or probation search, the searching officer may look into closed containers that he or she reasonably believes are in the complete or joint control of the parolee or probationer. [Citations.]" (*Baker, supra,* 164 Cal.App.4th at p. 1159.)

Here, the officers were justified in searching the interior of the car based on Hubbard's parole status. Further, when the car was initially stopped, the backpack was located within Hubbard's reach, just behind and to the left of his left arm, and Johnston did not assert a claim of ownership to the backpack either by word or conduct when the car was searched. Officer Park could reasonably conclude from these circumstances that the backpack was in Hubbard's complete *or* joint control and that he was entitled to search it pursuant to Hubbard's parole status.

Johnston misplaces his reliance on this court's decision in *Baker, supra,* 164 Cal.App.4th 1152 to argue that reversal is required here. In *Baker,* this court held that the search of a female passenger's purse could not be justified by the male driver's parole

search conditions. (*Id.* at p. 1156.) Defendant Baker was the only passenger in a vehicle that was stopped for speeding. Baker was sitting in the front passenger seat and her purse was situated at her feet. When Baker was ordered to exit the vehicle during the subsequent parole search, she did so without taking her purse or asserting ownership of the purse. (*Ibid*.) As noted above, in *Baker,* we held that an officer conducting a parole search may look into closed containers that he or she reasonably believes are in the complete or joint control of the parolee or probationer. We also stated, "There is no obligation to ask whether the purse belonged to the parolee before searching it. [Citation.] And we agree that simply because a container is clearly designed for a person other than the parolee does not mean it may never be searched." (*Id*. at p. 1160.) On the facts presented there, however, we concluded that "there could be no reasonable suspicion that the purse belonged to the driver, that the driver exercised control or possession of the purse, or that the purse contained anything belonging to the driver. [Citation.]" (*Id*. at p. 1159.)

*Baker* is inapposite because it involved a search of a distinctly feminine purse. Further, there was nothing in *Baker* to overcome the obvious presumption that the purse belonged to the sole female occupant of the vehicle who was not subject to a parole condition. (*Baker, supra,* 164 Cal.App.4th at p. 1160.) In contrast, here, there were no circumstances that indicated the backpack belonged to Johnston and not Hubbard.

***The Detention was not Unduly Prolonged***

Once a vehicle has been lawfully stopped for a traffic violation (which Johnston does not challenge here), a routine traffic detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." (*Florida v. Royer* (1983) 460 U.S. 491, 500.) "A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the

stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the stop's duration. [Citation.]" (*Arizona v. Johnson* (2009) 555 U.S. 323, 325.) The officer is entitled to detain the driver and passengers for the period of time necessary to discharge his duties related to the traffic stop. (*People v. Brown* (1998) 62 Cal.App.4th 493, 496-497.) The officer may ask questions that are not directly related to the purpose of the traffic stop as long as relevant time parameters are not exceeded (*People v. Gallardo* (2005) 130 Cal.App.4th 234, 239), and the officer may order the driver and passengers to exit the vehicle without any articulable justification (*Knowles v. Iowa* (1998) 525 U.S. 113, 117-118; *People v. Hoyos* (2007) 41 Cal.4th 872, 892-893). Further, "[c]ircumstances which develop during a detention may provide reasonable suspicion to prolong the detention. [Citation.] There is no set time limit for a permissible investigative stop; the question is whether the police diligently pursued a means of investigation reasonably designed to confirm or dispel their suspicions quickly. [Citations.]" (*People v. Russell* (2000) 81 Cal.App.4th 96, 102.)

Here, within a minute of stopping the car, the officers found out that the front seat passenger was on parole, which entitled them to search the interior of the car. Within three minutes of the initial stop, the officers asked Johnston to step out of the car and asked him for permission to search his person, which he consented to. Within seven minutes of the initial stop, the officers had searched the interior of the car and the backpack, and Johnston had consented to the second search of his person, which resulted in the discovery of two baggies of methamphetamine upon his person.

It is Johnston's burden on appeal to affirmatively demonstrate error with any uncertainty being resolved against him. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1250;

*People v. Clifton* (1969) 270 Cal.App.2d 860, 862.) Johnston, however, points to no facts indicating that the detention in this case was longer than ordinarily necessary to perform the duties associated with a traffic stop and the parole search. Further, once the officer found the digital scale and the baggies in the backpack, the officer had reasonable suspicion to extend the detention to investigate who they belonged to and whether that person was in possession of other contraband. Thus, we conclude that the detention was not unduly prolonged, that Johnston's second consent to search was voluntary, and that the court did not err when it denied Johnston's motion to suppress.

## DISPOSITION

The judgment is affirmed.